



**ADVOCATES
FOR HIGHWAY
AND AUTO SAFETY**

DEPT. OF TRANSPORTATION
DOCKET SECTION

98 DEC -7 PM 3: 36

December 7, 1998

47748

FHWA Docket No. FHWA-98-3414-31
U.S. DOT Dockets, Room PL-401
U. S . Department of Transportation
400 Seventh Street, SW
Washington, DC 20590

**Commercial Vehicle Safety Alliance Out-of-Service Criteria: Advance
Notice of Proposed Rulemaking, 63 FR 38791 et sea., July 20, 1998**

Advocates for Highway and Auto Safety (Advocates) is pleased to submit these comments to the captioned docket. The Federal Highway Administration (FHWA) is seeking public comment on the future scope and effect, including the legal status, of the Commercial Vehicle Safety Alliance's (CVSA) motor carrier Out-of-Service (OOS) Criteria which are used by both federal and state motor carrier safety enforcement personnel to interpret and apply the Federal Motor Carrier Safety Regulations (FMCSR) in the field.

The need for OOS Criteria must be examined within the legal and procedural context in which the criteria are actually applied. OOS Criteria are used by state and federal officers during vehicle stops for safety inspections.¹ A determination that a vehicle violates OOS Criteria may result in the seizure of the vehicle, even if only for a short time, and may have additional legal implications for both driver and motor carrier. Viewed against this background,

¹Although CMV safety inspections are conducted through the Motor Carrier Safety Assistance Program (MCSAP), that program only creates a relationship between the federal and state governments for the purposes of performing inspections pursuant to the FMCSR. The MCSAP does not amend the U.S. Constitution or otherwise revise court precedent regarding reasonable search and seizure.



the validity of OOS Criteria must be indexed to existing constitutional standards for vehicular searches and seizures.

I. Legal Issues.

Considerations of due process require that law enforcement authority is not abused or exercised in an arbitrary manner. U.S. courts have long insisted that exercise of discretion by law enforcement officers in the field be appropriately circumscribed. To this end, enforcement personnel are required either to obtain a warrant from a magistrate or, where a warrant is not required, the actions of officers in the field must be constrained and guided by official enforcement policy.

In many search and seizure cases the Supreme Court has decried enforcement procedures that afford undue and excessive discretion to officers at the scene. The Court has applied this doctrine in many contexts: administrative searches where a warrant is required, see ***Camara v. Municipal Court***, 387 U.S. 523, 532 (1966) (the enforcement regime should not leave the occupant “subject to the discretion of the official in the field”); see also ***Marshall v. Barlow’s, Inc.***, 436 U.S. 307, 323 (1972) (objecting to authority that “devolves almost unbridled discretion upon executive and administrative officers, particularly those in the field”); roving checkpoints to enforce traffic regulations, see ***Delaware v. Prouse***, **440** U.S. 648, 661 (1978); border stops to enforce immigration laws, see ***Almeida-Sanchez v. U. S.***, **4** 13 U. S. 266, 270 (1972) (“[t]he search in the present case was conducted in the unfettered discretion of the members of the Border Patrol”).

However, the Court has approved of similar enforcement activity where the discretion exercised by the officers in the field is explicitly limited by higher officials or by established agency policy, see **Michigan v. Sitz**, 496 U.S. 444, 452 (1989) (“guidelines governing checkpoint operation minimize the discretion of the officers on the scene”); see also **United States v. Martinez-Fuerte**, 428 U.S. 543, 566 (1975) (enforcement decision to “seize” should not be “entirely in the hands of the officer in the field, and deference is to be given to the administrative decisions of higher ranking officials”).

In numerous instances, policy articulated by authorities having jurisdiction over field officers constitutes the legal boundaries or parameters for applying the “letter” of the law in such a way that they amount to enforcement tolerances. OOS orders are an enforcement mechanism exercised by officers pursuant to authority granted under the Federal-Aid Highway Act including, among others, §§ 506, 521, 31133, and 31142 of 49 United States Code. It is clear that the exercise of authority delegated to motor carrier safety inspection officers in the field does not allow the exercise of unfettered discretion in interpreting and applying the Federal Motor Carrier Safety Standards (FMCSR) and other applicable motor carrier safety requirements. Although agencies and their field enforcement personnel have considerable latitude in the general exercise of enforcement functions, these field officers must perform their duties under color of official policy that demarcates the extent of their discretion. Constitutional due process considerations require that the actions of field officers and inspectors are not based on arbitrary enforcement decisions but rather are instructed by properly adopted agency policy.

A difficulty with the CVSA OOS Criteria, however, is that, although they have come to assume a life of their own and, as we indicate below, are even used by federal officials both for their own enforcement actions as well as for approval of federal funds for states participating in the Motor Carrier Safety Assistance Program (MCSAP), they are still voluntary. Despite customary use and regular periodic revision, they nevertheless are not legally binding on inspectors or their agencies. Since there is no legal requirement that motor carrier field officials abide by such voluntary standards, the CVSA guidelines cannot satisfy due process requirements on judicial review. A system of enforcement guidance must be formally adopted by inspection authorities, including both state and federal agencies, as binding requirements for their enforcement personnel. In order to meet the constitutional test of due process protections, FHWA cannot simply advert to or acknowledge the existence and traditional or widespread use of the CVSA OOS Criteria. FHWA necessarily must assert the formal policy needed to bind field enforcement personnel by both directing and circumscribing the exercise of enforcement discretion through the application of the CVSA Criteria or of some cognate set of principles.

II. Voluntary Guidelines Cannot Substitute for Official Policy.

Another serious question relevant to this docket is whether regularizing enforcement guidelines in certain ways either fulfills or subverts the letter and purpose of law and regulation. It is clear from past enforcement contexts in other areas that enforcement guidelines can supplant on-the-books regulation in such a way that the actual enforced regulatory regime is dramatically different from promulgated regulations. In some cases, that substantial difference

produces a measurably lower quantum of public health and safety than would be the case if reduced latitude in enforcement tolerances had been adopted in the first instance.

Advocates is concerned that this is true to a considerable extent in the current CVSA enforcement guidelines. Because this is an advance notice of proposed rulemaking, we will not use these brief comments to conduct an exercise of demonstrating whether the enforcement content of each CVSA guideline does or does not fulfill the safety purpose of the correlative FMCSR. In any case, the FHWA has made it clear that "it is not seeking comment on the substance of the OOS Criteria at this time." 63 FR 38794. However, we would like to note here that there are numerous points of dissonance between the two arenas which Advocates regards as serious departures from fulfilling the goals of the FMCSR.

Also, the CVSA repeatedly amends its guidelines without benefit of open public participation in the process.² These guidelines do not stand apart from FHWA actions to fulfill the purposes of the FMCSR. The FHWA and the CVSA work closely together, and the CVSA consistently provides policy advice to the agency by means of its annual revision of the CVSA guidelines.³ Moreover, the importance of the OOS Criteria of the CVSA guidelines for

²CVSA argues in its comments filed with this docket that the process of review and amendment at its meetings is open to anyone interested in the process and issues. But this is irrelevant. Whether CVSA meetings can be attended by non-CVSA members has no bearing on the issue of constitutional due process requirements of proper notice regarding strictures used by public authorities in the exercise of enforcement functions, such as search and seizure actions. Moreover, guarantees of "openness" to attendance by anyone at the meetings of a membership organization is not an acceptable surrogate for the legal guarantees, including justiciability, of notice and comment rulemaking.

³The FHWA is a non-voting member of the CVSA * * * Committees of the CVSA
(continued.. .)

fulfilling the purposes of the FMCSR is underscored by the fact that they form a large part of the Commercial Vehicle Safety Plans reviewed and approved by the FHWA as a condition for receiving MCSAP funds. Even FHWA's federal safety investigators use the CVSA OOS criteria in their own roadside inspections performed each year. 63 FR 38793. In addition, the agency applies the OOS Criteria in making motor carrier safety fitness determinations. Id.

Consequently, even at the level of federal enforcement, compliance with the FMCSR is viewed through the lens of the CVSA enforcement guidelines. There is, therefore, inextricable linkage of the FMCSR with the CVSA enforcement guidance on at least four counts. Given this understanding of how the FMCSR are fulfilled only by means of their interpretation through the CVSA guidelines, Advocates does not agree with the agency's assertion that

The criteria themselves do not establish separate standards of conduct for regulated entities, nor is it intended that use of the criteria excuses other less serious violations of applicable safety regulations.

63 FR 38794. Indeed, the FHWA's own analysis at points in the instant notice belie this statement. Certain routine violations of certain FMCSR are excused virtually without exception because the judgment is made, reflected in the CVSA guidelines themselves for OOS orders, that such violations are not pressing threats to public safety. Accordingly, because the FMCSR are, in a real sense, applied through their observance and enforcement via the CVSA guidelines, and that observance and enforcement is also subsidized by federal funds, Advocates believes

³(. . . continued)

consider and recommend modifications to the OOS Criteria, which are then accepted or rejected by a vote of CVSA jurisdictions. The revised OOS criteria are then submitted to the FHWA for its use.

63 FR 38793 (emphasis supplied).

strongly that these guidelines need to be reviewed for their consonance with the purposes of the FMCSR through notice and comment in the Federal Register.

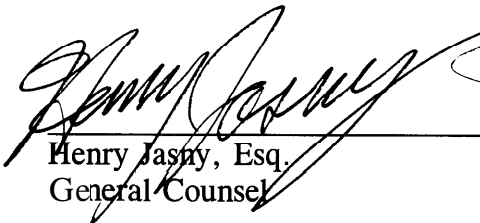
However, Advocates' belief that the CVSA guidelines are overdue for review and possible revision in an open, public forum such as the Federal **Register**, should not be misconstrued as support for guidelines which must rigidly be applied without exception. Advocates continues to regard carefully applied enforcement discretion as a fundamental need for realizing the aims of the FMCSR. Among other things, safety inspections frequently reveal several violations whose combined effects on public safety cannot be precisely quantified. In these instances, the judgment of safety inspectors must be applied on how best to serve the needs of public safety. Simply put, enforcement discretion and on-site decisions about a specific motor carrier cannot be comprehended only in published, voluntary guidelines because no guidelines can adequately anticipate the unique concatenation of events, circumstances, and specific safety violations that requires experienced judgment by a trained safety inspector. However, adoption of binding enforcement policy should be articulated in a way so that the flexible judgments of enforcement personnel in the field are clearly and properly constrained. While this may call for careful balancing, the need for judicious decisions by field officers in complex situations does not justify ignoring the boundaries established by enforcement policy.

The question remains, however, whether the current CVSA enforcement tolerances and other criteria constitute the best judgment to instruct enforcement personnel in their decisions which affect public safety on our highways. Advocates repeats its conviction that, if FHWA endorses the use of these guidelines as the binding enforcement direction for field personnel, the

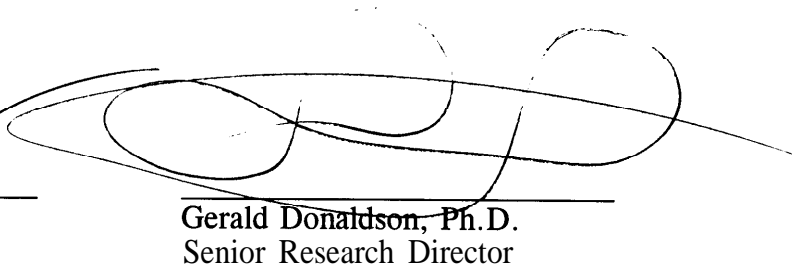
specific content of the CVSA OOS Criteria needs to be reviewed and potentially revised in a public proceeding through the Federal Register. The product of such a review should be published in the Federal Register and included in the Code of Federal Regulations as agency policy which legally augments the FMCSRs and actively applies them in the field.

The foregoing evaluation of the status of the CVSA guidelines shows that the FHWA faces two tasks: first, it must meet due process requirements by articulating binding policy for field officials who currently enforce the FMCSR through the application of the CVSA OOS Criteria; second, it must publicly review the content of the CVSA OOS Criteria to determine if they, or some other policy, is appropriate for the policy controlling the field enforcement actions of motor carrier safety inspection personnel. If the agency decides that the CVSA OOS Criteria are the appropriate vehicle for binding policy, the FHWA should review the content of the OOS Criteria through notice and comment in the Federal Register to determine the extent to which these guidelines, if adopted as policy, fulfill the purposes of the FMCSR.

Respectfully submitted,



Henry Jasny, Esq.
General Counsel



Gerald Donaldson, Ph.D.
Senior Research Director